Supreme Court, U.S.
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No. 96-1357

In The

Supreme Court of the United States

October Term, 1996

BRUCE SMITH, as personal representative of Ingrid Smith, Deceased,

Petitioner,

vs.

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, also known as Jamahiriya Security Organization and LIBYAN ARAB AIRLINES,

Respondents,

ABDEL BASSET ALI AL-MEGRAHI and LAMEN KHALIFA FHIMAH,

Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit ("Second Circuit") correctly ruled that Respondents' alleged participation in the destruction of Pan American Airways, Inc. ("Pan Am") Flight 103 did not constitute an implied waiver of foreign sovereign immunity to suit in United States under § 1605(a)(1) of the Foreign Sovereign Immunity Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602, *et seq.*

2. Whether the Second Circuit correctly ruled that Respondents did not impliedly waive foreign sovereign immunity to suit in the Untied States under § 1605(a)(1) of the FSIA, in a diplomatic communiqué to the Secretary General of the United Nations, which did not contain any reference to the Courts of the United States, or to the availability of a cause of action in the United States.

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COUNTER-STATEMENT OF THE CASE

Petitioner, Bruce Smith, contends that the Second Circuit erred in affirming the dismissal of his complaint against Respondents, the Socialist People's Libyan Arab Jamahiriya ("Libya"), the Libyan External Security Organization, and Libyan Arab Airlines, for lack of subject matter jurisdiction under the FSIA (Pet. Br. App. A).

Petitioner sued as the personal representative of a passenger who died in the destruction of Pan Am Flight 103 over Lockerbie, Scotland in December, 1988. *See* Joint Appendix submitted to the Second Circuit ("2d Cir. Jt. App.") at 19. Petitioner also sued two individual defendants, Abdel-Basset Ali Al-Megrahi ("Al-Megrahi") and Lamen Khalifa Fhimah ("Fhimah"). Petitioner claimed that Al-Megrahi and Fhimah were agents of Libya who caused the destruction of Flight 103. *See* 2d Cir. Jt. App. at 20. The Petitioner's complaints against Al-Megrahi and Fhimah were not dismissed (Pet. Br. App. C).

The Complaint asserted tort claims against Respondents for wrongful death, infliction of emotional distress and violation of international law. *See* 2d Cir. Jt. App. at 38-39. It also sought to enforce a so-called "guaranty contract," under which Petitioner claimed Libya had guaranteed collection of certain future judgments that might be obtained against Al-Megrahi and Fhimah. *See* 2d Cir. Jt. App. at 40-41.

The alleged "guaranty contract" was only one of several integrated proposals in a comprehensive diplomatic communiqué sent by Libya's Foreign Secretary to the Secretary General of the United Nations on February 27, 1992. *See* 2d Cir. Jt. App. at 217-219. Libya sent the communiqué in furtherance of negotiations conducted under the auspices of the United Nations, following demands by the United States and the United Kingdom

for extradition of Al-Megrahi and Fhimah. *See* 2d Cir. Jt. App. at 363-371. The communiqué did not make any reference to judicial proceedings against Libya anywhere, to the application of United States law, or to the availability of a cause of action in the United States.

The communiqué demanded certain reciprocal promises and performances, including an end to the economic boycott imposed against Libya. *See* 2d Cir. Jt. App. at 218-219. It expressly stated that Libya's proposed terms would become binding only if they were accepted. The proposals were rejected, and additional sanctions were ultimately imposed against Libya by the Untied Nations. *See* 2d Cir. Jt. App. at 315-318.

Respondents moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Petitioner's action: (i) for lack of subject matter jurisdiction under the FSIA; (ii) for lack of personal jurisdiction under the FSIA and the due process clause of the Fifth Amendment; and (iii) for pendency of a prior parallel action brought by Petitioner in Scotland. *See* 2d Cir. Jt. App. at 45-46. By Memorandum and Order dated May 17, 1995, the Eastern District of New York dismissed Petitioner's complaint against Respondents for lack of jurisdiction under the FSIA (Pet. Br. App. B). Since the jurisdictional issue was dispositive, the District Court did not reach the issue of whether dismissal was also warranted due to the pendency of Petitioner's prior action in Scotland to recover on the same injuries. A partial final judgment, dismissing Petitioner's action, was entered on September 15, 1995 pursuant to Fed. R. Civ. P. 54(b) (Pet. Br. App. C).

SUMMARY OF ARGUMENT

I. Petitioner argues that Respondents' alleged involvement in the destruction of Pan Am Flight 103 was a "non-sovereign"

act because it violated *jus cogens* norms of international law, and, as such, impliedly waived foreign sovereign immunity under the FSIA's "implied waiver" exception to immunity, 28 U.S.C. § 1605(a)(1). This Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) teaches that violations of international law do not create jurisdiction under the FSIA unless they fall within one of the FSIA's express exceptions to immunity. There is no *jus cogens* exception in § 1605(a)(1).

Upon careful examination of the text and legislative history of § 1605(a)(1), the Second Circuit rejected, as contrary to Congressional intent, Petitioner's argument that the commission of a "non-sovereign" act effects an "implied waiver" of immunity under § 1605(a)(1). This result was fully consistent with this Court's holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. at 436, that the FSIA precludes subject matter jurisdiction in all suits against foreign sovereigns "involving alleged violations of international law that do not come within one of the FSIA's exceptions." It was also fully consistent with the decisions of the two Circuits that have previously considered the question of whether an alleged *jus cogens* violation forfeits immunity under the FSIA. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995) (following *Amerada Hess*; rejecting theory that *jus cogens* violation forfeits immunity under 28 U.S.C. § 1605(a)(1)); *Siderman v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (alleged violation of *jus cogens* did not forfeit immunity under the FSIA).

Accordingly, Petitioner's contention that Respondents "impliedly waived" immunity under 28 U.S.C. § 1605(a)(1) provides no occasion for this Court's review.[1]

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1. In an amicus curiae brief, filed at the request of the Second Circuit, the United States Government expressed the view that Petitioner's "theory is neither supported in law nor would it serve the national interests of the United States" (Govt. Br. p. 7).

II. Petitioner also contends that Respondents "impliedly waived" immunity by allegedly guaranteeing judgments that might be obtained against Al-Megrahi and Fhimah.

The so-called "guaranty" is only a fragment of a diplomatic communiqué from Libya's Foreign Secretary to the Secretary General of the United Nations, dated February 27, 1992. *See* 2d Cir. Jt. App. at 217-219. Not only is the "guaranty" devoid of any suggestion that Respondents intended to submit to the jurisdiction of United States Courts, it actually rejects the possibility of legal proceedings in the United States. Moreover, Respondents' proposed "guaranty" obligations were expressly made contingent upon the acceptance of certain proposals which were rejected.

The Second Circuit correctly determined that the portion of the communiqué concerning the "guaranty" did not constitute a waiver of immunity since it contained "no express or indirect reference to a waiver of sovereign immunity" (Pet. Br. App. A p. 16a). The Second Circuit's holding was again fully consistent with this Court's holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 448 U.S. at 42-43 ("[W]e [do not] see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in the United States Courts or even the availability of a cause of action in the United States").

The Petitioner's contention that the so-called "guaranty" effected a waiver of immunity again offers no occasion for this Court's review.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S HOLDING THAT RESPONDENTS' ALLEGED *JUS COGENS* VIOLATION DID NOT IMPLIEDLY WAIVE IMMUNITY WAS CONSISTENT WITH THE DECISIONS OF THIS COURT, AND WITH THE HOLDINGS OF OTHER CIRCUITS THAT HAVE CONSIDERED THE EFFECT OF *JUS COGENS* VIOLATIONS UNDER THE FSIA.

The FSIA provides the sole basis for the assertion of subject matter jurisdiction by a United States Court over an action against a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. at 439. Unless an action against a foreign state is based upon acts which fall within one of the FSIA's specifically enumerated exceptions to immunity, the Federal Courts have no power to adjudicate it. 28 U.S.C. § 1604; *Verlinden B. V. v. Central Bank Of Nigeria*, 461 U.S. 480, 489, 493 (1983).

In *Amerada Hess*, this Court specifically held that the FSIA precludes subject matter jurisdiction in all suits against foreign sovereigns "involving alleged violations of international law that do not come within one of the FSIA's exceptions." *Id.* at 436.

Petitioner argues that Respondents' alleged terroristic acts "impliedly waived" immunity under 28 U.S.C. § 1605(a)(1), because they violated *jus cogens* norms of international law and, therefore, were "non-sovereign in nature" (Pet. Br. p. 20). Petitioner's premise — that the FSIA's "implied waiver" exception is invoked by any "non-sovereign or private act" committed by a foreign sovereign (Pet. Br. p. 18) — is incorrect.

First, § 1605(a)(1) simply does not say what Petitioner wants it to say. It makes no reference to the "sovereign" or "non-sovereign" character of an act. If Congress had intended foreign sovereign immunity to be forfeited by the commission of any "non-sovereign" act, it would have drafted language appropriate to that end.

Second, the Petitioner's argument overlooks the fact that Congress created express exceptions to immunity for certain limited classes of "non-sovereign" acts. Section 1605(a)(2) excepts "non-sovereign" commercial activity. Section 1605(a)(7), enacted in 1996, excepts certain specified *jus cogens* violations, including airplane sabotage and extrajudicial killing. If, as petitioner contends, § 1605(a)(1) is a general jurisdictional "grab-bag" that applies to all "non-sovereign" conduct, these limited exceptions for certain "non-sovereign" acts would be meaningless surplusage. All "non-sovereign" acts would already be encompassed by § 1605(a)(1).

In *Amerada Hess*, this Court ruled that Congress' creation of explicit, limited exceptions for certain acts by foreign states meant that Congress had granted immunity in all cases which did not fit the express terms of the exceptions. *Id.* at 436. Thus, Congress' enactment of express exceptions for "non-sovereign" commercial activity in § 1605(a)(2), and for certain *jus cogens* violations specified in § 1605(a)(7), requires the conclusion that Congress has granted immunity in all cases involving other "non-sovereign" activity.

Third, the legislative history of § 1605(a)(1) is completely devoid of any suggestion that Congress ever intended "implied waiver" to depend on the "sovereign" or "non-sovereign" character of a foreign state's act. To the contrary, the legislative history demonstrates that Congress intended "implied waiver" to turn on whether the foreign state had committed an act which

unmistakably evidenced an intention to waive immunity. Congress gave three specific examples of implied waiver: (i) agreement to arbitrate in another country; (ii) agreement that the laws of another country will govern a contract; and (iii) filing a responsive pleading without raising sovereign immunity as a defense. H.R. Rep. No. 1487, 1976 U.S. Code Cong. & Admin. News 6604, 6617. Not even one of Congress' examples turns on the "sovereign" or "non-sovereign" character of an act. The common thread running through all three examples is that they provide objective evidence that the foreign state intended to submit to the jurisdiction of the United States. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991).

Fourth, Petitioner's argument, that *jus cogens* violations forfeit immunity under the FSIA, is contrary to the construction of the FSIA by the Circuits that have previously considered the issue. In *Princz v. Federal Republic of German*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995), the D.C. Circuit, following *Amerada Hess*, held that the absence of any express *jus cogens* exception to immunity under the FSIA is fatal to the contention that *jus cogens* violations confer subject matter jurisdiction under the FSIA's implied waiver exception. In rejecting the theory, the Court stated:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading § 1605(a)(1) would likely place an enormous strain not only on our courts but, more to the immediate

> point, upon our nation's diplomatic relations with any number of foreign nations.

Princz, 26 F.3d at 1174. *Accord Siderman*, 965 F.2d at 719 ("if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so"); *DeNegri v. Republic of Chili*, 1992 W.L. 91914, *3 (D.D.C. 1992) ("under the guidance of *Amerada Hess*, the FSIA itself, and its legislative history, the Court is constrained to conclude that Congress did not intend violations of jus cogens to come within the waiver exception of the FSIA. . . ."). This Court refused to upset the holdings in *Princz* and *Siderman* that the FSIA does not create jurisdiction in actions based on alleged *jus cogens* violations. *Princz*, 115 S. Ct. 923 (1995); *Siderman*, 507 U.S. 1017 (1993).

The unanimous refusal of the courts to accept the all-encompassing construction of the "implied waiver" exception urged here by Petitioner respects Congress' recognition "of the political sensitivity of actions against foreign states . . ." H.R. Rep. No. 94-1487, 1976 U.S. Code Cong. & Admin. News 6604. *See, e.g., Verlinden*, 461 U.S. at 493 ("actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States . . .").

Finally, Congress' recent enactment of 28 U.S.C. § 1605(a)(7) further demonstrates that the "implied waiver" exception was never intended to reach *jus cogens* violations. Section § 1605(a)(7) provides, in pertinent part, that a foreign state is not immune in actions

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage,

> hostage taking, or the provision of material support or resources (as defined in Section 2339A of Title 18) for such an act if such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . .

Congress' 1996 enactment of an express exception of immunity for the *jus cogens* violations specified in § 1605(a)(7) is evidence that Congress never intended § 1605(a)(1) to create a general exception to immunity for *jus cogens* violations, much less for all "non-sovereign" conduct.

II.

THE ALLEGED "GUARANTY" DID NOT "IMPLIEDLY WAIVE" IMMUNITY UNDER § 1605(a)(1).

Petitioner also contends that Libya expressed a "subjective intent" to waive immunity in a February 27, 1992 diplomatic communiqué to the United Nations Secretary General (Pet. Br. p. 25). According to Petitioner, the communiqué contained "an implied waiver of [Libya's] immunity from suit to enforce its responsibility as . . . . guarantor" of any judgment entered against co-defendants, Al-Megrahi and Fhimah (Pet. Br. p. 25).

Petitioner's argument ignores the fact that Libya's alleged "guaranty" was only one of several integrated proposals contained in a comprehensive diplomatic communiqué which was *rejected* by the United Nations. Petitioner's statement also ignores the actual text of the communiqué, which repudiates any notion that Respondents intended to submit to suit in United States courts.

There is nothing in Libya's communiqué that evidences an intention to submit to the jurisdiction of United States courts. The communiqué did not even make oblique reference to legal proceedings in the United States. As this Court noted in *Amerada Hess*, "we [do not] see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States Courts or even the availability of a cause of action in the United States." *Id.* at 442-443 (rejecting claim that Argentina impliedly waived immunity by agreeing to pay compensation to merchant ships under the Geneva Convention of the High Seas).

An agreement implies a waiver of sovereign immunity only when it contains terms that clearly indicate that the foreign sovereign is willing to subject itself to legal proceedings under the agreement in the United States. *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1103-1104 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) (agreement must specifically foresee role for United States Courts). In the absence of terms that evidence the foreign sovereign's unequivocal contemplation of litigation in a United States forum, there is no implicit waiver. *Cf. Marlowe v. Argentine Naval Commission*, 604 F. Supp. 703, 708-709 (D.D.C. 1985) (waiver implied by express choice of District of Columbia law); *Maritime Ventures International, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988) (waiver implied by agreement to arbitrate in New York).

Moreover, "most Courts have been reluctant to find an implied waiver of immunity to suit in the United States by reason of a waiver in a jurisdiction other than the United States." *Kao Wha Shipping Co., S.A. v. China Steel Corp.*, 816 F. Supp. 910, 916-917 (S.D.N.Y. 1993). For example, a contract clause to

arbitrate in another nation or to apply the laws of another nation does not waive immunity to suit in the United States. *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 577 (2d Cir. 1993).

Libya's diplomatic communiqué did not contain a single word about submitting to litigation anywhere, much less in the courts of the United States. Nor did it say the proposed guaranty would be controlled by United States law. There is nothing in the proposal that even remotely suggests "the availability of a cause of action in the United States."

Petitioner's contention that the proposed guaranty expresses an intention to submit to the jurisdiction of the United States cannot be reconciled with the only reference to legal proceedings actually contained in the communiqué. The proposal discussed only legal proceedings against Al-Megrahi and Fhimah, not against Libya. Libya's proposal required that these proceedings take place: (i) in a "third party" country, not in the United States; and (ii) under international law, not United States law.

The Second Circuit's holding that the communiqué did not effect a waiver of immunity is, again, fully consistent with prior constructions of § 1605(a)(1) by this Court, and by the Courts of Appeals.

CONCLUSION

The Second Circuit's holding, that an act in violation *jus cogens* does not invoke the "implied waiver" exception to immunity under § 1605(a)(1) of the FSIA, is consistent with the results reached by the Circuits that have previously considered the effect of alleged *jus cogens* violations under the FSIA. The Second Circuit's holding is also fully consistent with this Court's holding in *Amerada Hess* that alleged violations of international law do not forfeit immunity under the FSIA unless they fit within one of the FSIA's express exceptions. Moreover, Congress' recent enactment of § 1605(a)(7), eliminating foreign sovereign immunity in suits for damages arising from certain *jus cogens* violations, mandates the conclusion that such acts are not embraced by the "implied waiver" exception of § 1605(a)(1).

The Second Circuit's determination that Respondents' diplomatic communiqué was not an "implied waiver" of immunity is also fully consistent with the settled construction of § 1605(a)(1). The courts have required a manifestation of a foreign state's intention to waive immunity. The communiqué contains no such manifestation of any such intention, since it makes no reference to United States courts, or to United States law. The language of the communiqué is expressly hostile to the notion of any legal proceedings in the courts of the United States.

Accordingly, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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